Filed 2/15/11 P. v. Lopez CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALEX BRIAN LOPEZ, Defendant and Appellant.	H035560 (Santa Clara County Super. Ct. No. CC938627)

Defendant Alex Brian Lopez was charged by complaint with second degree burglary (Pen. Code, §§ 459, 460, subd. (b)) of Home Depot on November 25, 2008, petty theft with a prior (Pen. Code, § 666) from Home Depot on November 25, 2008, and petty theft with a prior from Home Depot on August 17, 2008. It was further alleged that he had suffered a prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and twice served prison terms for felony convictions (Pen. Code, § 667.5, subd. (b)). Defendant entered unconditional no contest pleas to all three counts and admitted the prior conviction and prison prior allegations. His motion to withdraw his pleas and admissions was denied, and he was sentenced to 32 months in state prison.

On appeal, his appointed appellate counsel has filed an opening brief which states the case and the facts but raises no issues. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant has filed a supplemental brief on his own behalf in which he raises a number

of contentions. None of defendant's contentions has merit. We have reviewed the entire record, and there are no arguable issues. Therefore, we affirm the judgment.

I. Background

Defendant's criminal history dates back to 1991 and includes numerous convictions for narcotics, theft, evading an officer, and resisting arrest. Defendant's 1998 strike conviction was for first degree robbery. He and a compatriot entered a man's home, held the man's parents at gunpoint, and took electronic equipment from the home. Defendant also has a history of probation and parole violations.

On August 17, 2008, defendant went into a Home Depot, picked up a barbeque grill, and took it to a register. At the register, he gave the cashier a receipt, claimed to have purchased the grill at another store, and sought to return the grill.

On November 25, 2008, defendant and two women entered a Home Depot. Defendant loaded a cart with three large items, and the women loaded another cart with merchandise. He and the women went to a register with their two carts. While one of the women was speaking with the cashier at the register, defendant began walking toward the store's exit with his cart even though only two of his three items had been scanned by the cashier. The cashier told him to stop. Nevertheless, defendant left the store, and one of the women left the store with his cart without paying for the third item.

On March 26, 2009, a complaint was filed charging defendant with the August and November 2008 Home Depot offenses. Defendant was initially represented by public defender Jaime Feder, but she was replaced by Ben Koller. Koller was subsequently relieved, and Feder was reappointed to represent defendant. On May 28, 2009, just a week after Feder's reappointment, defendant entered no contest pleas to all three counts and admitted the prior conviction and prison prior allegations. His pleas and admissions were entered with "no conditions," but the "understanding," which was placed on the

record, was that defendant would be sentenced by Judge Ron Del Pozzo, before whom defendant had two narcotics cases pending.[1]

At the time he entered his pleas and admissions, defendant affirmed that nothing was impacting his "ability to think clearly" and that he had "had enough time" to consult with his attorney about any "possible defenses" he might have to the charges. He also affirmed that he was "satisfied" with his attorney's advice and that there were not "any other promises" made to him "in exchange for [his] plea." Defendant also acknowledged that he understood that he was facing a maximum prison term in this case of eight years and eight months and that, "[s]ince there are no conditions to your plea, this means that the Court can sentence you to the maximum term in prison."

After defendant had entered his pleas and admissions in this case and in his two narcotics cases, a fourth case was filed against him. The fourth case was a receiving stolen property (Pen. Code, § 496) offense that had occurred between the offenses charged in this case.

Feder filed a request that the court exercise its discretion to strike the prior conviction finding. In August 2009, the court held a hearing to consider defendant's request for substitute counsel. Although the court did not credit defendant's claim that Feder had been ineffective, the court suggested that substitute counsel would be required to assist defendant in bringing a motion to withdraw his pleas and admissions on the ground of ineffective assistance, which defendant said he wished to file. Deanna Burneikis was thereafter appointed to represent defendant in place of Feder, and, in October 2009, Burneikis filed a motion to withdraw the pleas and admissions. The grounds for the motion were that Feder had been prejudicially deficient in failing to "obtain and view the video," and that defendant had been "under duress" and "emotionally unstable" when he entered the pleas and admissions.

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[1] The narcotics offenses had been committed in June 2008 and November 2008.

At the December 4, 2009 hearing on the motion to withdraw the pleas and admissions, both defendant and Feder testified.[2] Defendant testified that he entered his pleas and admissions with the understanding that he would spend six months in a Salvation Army drug treatment program "followed by a four-year suspended sentence." He asserted that Feder had told him that "Salvation Army was what was gonna be the outcome of the case." Defendant claimed that Judge Del Pozzo had "guaranteed" him that he would go to Salvation Army for this case, but he conceded that this guarantee had not been made on the record. Defendant also testified that he was aware that there was a video and that Koller had requested the video from the prosecutor. Before he entered his pleas and admissions, he asked Feder about the video, and she told him that she had not viewed it and that it was "unimportant."

Feder testified that she had never promised defendant that he would be sent to Salvation Army or told him that such a disposition was guaranteed. Judge Del Pozzo had told Feder that a motion to strike the strike prior was a "'slam dunk'" and that it was "likely" he would send defendant to Salvation Army, and Feder relayed this information to defendant. She also told defendant that Judge Del Pozzo had always, in her experience, followed his "indicated sentence." However, Feder did not recommend that defendant enter the pleas and admissions based on Judge Del Pozzo's statements. She took a neutral position. "[W]hat I told Mr. Lopez was that I thought this was a devil's bargain, because he was taking a leap of faith that Judge Del Pozzo wasn't going to freak out and sentence him to something other than what we agreed upon, . . . and there was a lot of exposure and I told him he was taking a leap of faith that something wasn't going to go awry, and even if it didn't he was taking a leap of faith on a probation violation because being on probation for three dockets was very dangerous." Defendant

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[2] Defendant waived his attorney-client privilege with regard to his conversations with Feder.

nevertheless wanted to proceed with entering his pleas and admissions. Feder testified that she was aware of the video, but she had not obtained it prior to defendant's change-of-plea hearing. Defendant knew that she did not have the video and had not seen it. She "assumed it was exculpatory" because Koller had told her that he had obtained it and that it was exculpatory. Feder told defendant: "if you're telling me you're not guilty, don't plead, we can wait, we can get the video, we can see what it says, we can fight the case, and he didn't want to do that because it would delay going to Salvation Army." Defendant did not want her to review the video before he entered his pleas and admissions. Feder told him that "pleading with no conditions was a very risky move." However, defendant chose to go forward and enter the unconditional pleas and admissions. When the receiving stolen property case was subsequently filed against defendant, the potential disposition involving Salvation Army "fell apart."

Burneikis argued that defendant should be permitted to withdraw his pleas and admissions because Feder had been prejudicially deficient in failing to review the video and defendant had been under "duress" when he entered his pleas and admissions. She identified the duress as his desire to go to Salvation Army and his belief that this would occur. The court found that defendant had failed to satisfy his burden of showing ineffective assistance of counsel or duress. It denied the motion.

The sentencing hearing was scheduled for March 19, 2010, with the motion to strike to be heard at that time. At the commencement of the March 19 hearing, attorney Ingo Brauer made a special appearance and asked the court to continue the hearing so that defendant would have the time to retain Brauer as his attorney. Brauer proposed that, if defendant retained him, he would submit additional briefing on the motion to strike. Brauer was unsure whether defendant would be retaining him. The court granted a two-week continuance, and the sentencing hearing was continued to April 2. The court explicitly told Brauer that any additional briefing would need to be submitted by March 26.

At the April 2, 2010 hearing, Brauer sought to substitute in and requested a further continuance. He explained that he had just been retained a day earlier, and he had not yet had an opportunity to do any work on the case. Brauer was not willing to substitute in without a continuance. Burneikis stated that she did not require a continuance if she remained defendant's attorney. The court refused to grant a continuance, and Burneikis remained defendant's attorney.

The court proceeded with the hearing on the motion to strike and denied that motion. The court imposed a 32-month state prison term. It struck the punishment for the prison priors. Defendant timely filed a notice of appeal and a request for a certificate of probable cause. His request for a certificate was denied.

II. Discussion

Defendant's first contention involves a surveillance video from Home Depot.[3] He appears to contend that both his trial counsel and his appellate counsel were prejudicially deficient in failing to obtain and view this video, the trial court prejudicially erred and committed "misconduct" in excluding this video, and the prosecutor violated his duty to disclose exculpatory evidence and committed misconduct by withholding this video. Defendant's contentions regarding the video may not be raised in this appeal because he failed to obtain a certificate of probable cause. (Pen. Code, § 1237.5.) All of his contentions regarding the video relate to the validity of his pleas and admissions, which cannot be challenged without a certificate.

Defendant's second contention is that the trial court erred in denying his request to substitute counsel and for a further continuance on the date of his continued sentencing hearing. The trial court did not err in denying Brauer's request for a second continuance

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[3] The record does not reflect whether this video related to the August offense or the November offenses.

of the sentencing hearing, as the sentencing hearing had already been continued at Brauer's request and he made no showing of good cause for a further continuance. Since Brauer's request to substitute in as defendant's counsel was expressly contingent on the granting of his continuance request, it was not ruled on by the trial court.

Defendant's third claim is that his trial counsel was prejudicially deficient in failing to ensure that his "plea-deal" was "honored." This claim lacks its premise. Defendant did not have a "plea-deal"; he entered *unconditional* pleas and admissions. Thus, the trial court had no "deal" that it was required to "honor[]."

Defendant's final assertion is that the trial court erroneously denied his motion to withdraw his pleas and admissions. This contention is barred by his failure to obtain a certificate of probable cause. The grounds for his motion to withdraw related to the validity of his pleas and admissions, and such claims, even where raised in a postplea motion to withdraw, require a certificate of probable cause. (*People v. Johnson* (2009) 47 Cal.4th 668, 679-680.)

Our review of the entire record has disclosed no arguable issues.

III. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Duffy, J.